

COMMISSION HEARING OFFICER DIRECTIVE

ADMINISTRATIVE
MATTERS

☐

DATE May 5, 2008

MOTOR CARRIER
MATTERS

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DOCKET
NO. 2007-440-E

UTILITIES MATTERS

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ORDER NO. N/A

HEARING OFFICER: **B. Randall Dong**

DOCKET DESCRIPTION:

In re: Application of Duke Energy Carolinas, LLC for Approval of Decision to Incur Nuclear Generation Pre-Construction Costs for the Lee Nuclear Station in Cherokee County

ADMINISTRATIVE MATTERS UNDER CONSIDERATION:

Request for Hearing Officer Directive pursuant to Commission Order No. 2008-327 with regard to unresolved discovery issues relating to Motion to Compel by Friends of the Earth and Motion for Protective Order by Duke Energy Carolinas, LLC

HEARING OFFICER ACTION:

In Order No. 2008-327, issued on April 25, 2008, the Commission found that Duke Energy Carolinas, LLC had not adequately responded to the discovery requests propounded by Friends of the Earth and ordered that Duke supplement its responses. On Wednesday, April 30, 2008, Duke served its First Supplemental Discovery Response, which included production of 12 pages of documents responsive to Request No. 9. On Thursday, May 1, 2008, Duke served its Second Supplemental Discovery response, which identified approximately 410 pages of documents responsive to the Friends of the Earth's requests. Of the approximately 410 pages Duke identified, the Company produced approximately 251 pages. Duke withdrew its claim of confidentiality as to these documents. With regard to the remainder, consisting of approximately 159 pages, Duke continued to assert confidentiality and sought protection. The Company offered to produce these documents to FOE under the condition that any and all persons seeking to view these documents, prior to being granted access to the documents, execute confidentiality agreements prohibiting public disclosure of the information contained therein. FOE has refused to enter into

any agreements with Duke which would in any way restrict these documents from becoming public. Having reached impasse, Duke and FOE met with me, as Hearing Officer, at 9:30 a.m. on Monday, May 5, 2008 and sought my directive as to the remaining discovery matters in dispute in regard to Duke's motion for protective order and FOE's motion to compel production. Friends of the Earth also requested that I rule upon its motion to compel Duke to permit him and his client to enter the Cherokee County site of the proposed plant to inspect and photograph the premises.

With regard to the motion to compel Duke to allow entry to the site for inspection and photography, I have ordered Duke to permit entry, inspection, and photography on the site as soon as practicable, at a mutually agreeable time.

With regard to the remainder of the discovery issues, the Commission is charged with the responsibility of ensuring that all parties to this proceeding have full and fair access to the materials to which they are entitled in discovery, while at the same time, protecting from public disclosure any information to which the responding party has a valid claim of confidentiality. In this case, Duke asserts that public disclosure of certain information pertaining to the projected pre-construction and construction costs of the proposed nuclear plant could be used to adversely affect Duke's ongoing and future negotiations with various vendors for goods and services in connection with the proposed nuclear plant, and that the resulting increase in costs would culminate in higher utility rates for the rate-paying public.

I find that, to the extent that Duke is in possession of certain materials relating to those pre-construction costs already expended and to the total projected costs, the disclosure of which would not adversely affect Duke's ability to negotiate the lowest possible total cost for those components of the plant, such documents should be produced to FOE without restriction. With regard to those documents for which Duke maintains its claim of confidentiality, Duke must produce such documents under a confidentiality order. Each and every person seeking access to these documents must, as a precondition of viewing the documents, agree in writing not to disclose the information contained therein to any person or persons not similarly bound.

Friends of the Earth has refused to enter into any such confidentiality agreement to date. FOE asserts that it refuses to enter into any confidentiality agreement as a matter of principle, claiming that any and all information it receives in the course of discovery should be public information. The purpose of discovery is to ensure that all litigants have access to materials which may reasonably lead to the discovery of relevant admissible evidence. In this way, the discovery process ensures that all parties have a full and fair opportunity to gather the information needed to advance their respective positions before the Commission. Discovery materials deemed sensitive or confidential may properly be shielded from public disclosure. The Commission is given broad authority to impose confidentiality

orders shielding certain sensitive information from public disclosure, especially when the ultimate consequence of public disclosure may be higher utility rates for the rate-paying public, as is claimed here. See, *Hamm v. S.C. Public Service Comm'n*, 312 S.C. 238, 439 S.E.2d 852 (1994) (South Carolina Supreme Court upheld Commission order requiring Consumer Advocate to sign confidentiality agreement as a condition of disclosure of coal contracts).

In this case, Duke has produced much of the information it has identified as responsive to FOE's requests without restriction. It has also offered FOE access to the remainder of the information, provided that the individuals seeking to view the materials execute a confidentiality agreement. These measures result in no prejudice to FOE's ability to litigate its case, and I find that the imposition of confidentiality agreements as to these documents is necessary to allow this proceeding to move forward. FOE's lawyer and its experts have full access to the documents Duke identifies as responsive to FOE's discovery requests, on the sole condition that the information deemed confidential not be disclosed to the public. It is FOE's prerogative not to avail itself of access to these confidential documents, but as the Commission has already noted, FOE cannot enhance its position in the discovery process by refusing to access the confidential documents.